Supreme Court, U.S.
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No. 04-1527

In the Supreme Court of the United States

S.D. WARREN COMPANY,

Petitioner

v.

MAINE DEPARTMENT OF
ENVIRONMENTAL PROTECTION

Respondent

ON WRIT OF CERTCIORARI TO THE
MAINE SUPREME JUDICIAL COURT

BRIEF AMICI CURIAE OF THE FRIENDS OF THE EVERGLADES IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

Whether a state has conditioning authority pursuant to section 401 of the Clean Water Act, 33 U.S.C. § 1341, for the relicensing of a hydroelectric dam, the operation of which involves the discharge of water back into the river after it has passed through the turbines and other dam structures, and results in continuing negative impacts to the water quality of the river?

TABLE OF CONTENTS

Page

QUESTION PRESENTED. i

TABLE OF CONTENTS. ii

TABLE OF AUTHORITIES. iv

INTERESTS OF *AMICUS CURIAE*. 1

SUMMARY OF ARGUMENT. 3

ARGUMENT 7

A. The Supreme Court Opinion In *South Florida Water Management District v. Miccosukee Tribe of Indians* Did Not Hold That There Is No Addition Of Pollution From One Water Body To Another If There Is No Meaningful Distinction Between The Two Water Bodies 7

B. Section 304(f)(2)(F) Of The Clean Water Act Is Not An Exemption For Movement Though Dams As Nonpoint Sources 10

C. The Inquiry Must Be Whether There Is A Discharge Of Pollutants 12

D. The September 15, 2005 EPA Interpretation Merits No Deference 14

E. Nonpoint Sources Are Not Exempt From Point Source Provisions Of The CWA. 20

F. There is No Distinction Between Pollution And Pollutants 23

CONCLUSION 24

TABLE OF CITATIONS

CASES: **PAGE**

Chevron v. Natural Resources Defense Council, Inc.
467 U.S. 837 (1984). 14, 15

Consumer prod. Safety Comm'n v. GTE Slyvania, Inc.
447 U.S. 102, 108 (1980) 15

Edward Christensen, et. at., v. Harris County, et. al
529 U.S. 576, 582-83 (2000) 17

EPA v. California ex rel. State Water Resources Control Board (EPA v. California)
426 U.S. 200 (1976). 18

Friends of Everglades v. South Florida Water Management District
Southern District of Florida, District Court Case No.02-80309 6

Hodel v. Virginia Surface Mining & Reclaimation Assn., Inc
452 U.S. 264, 282 (1981) 21

Milwaukee v. Illinios
451 U.S. 304 (1981) 18, 21

Nat'l Wildlife Fed'n v. Consumers Power Co.
862 F.2d 580 (6th Cir. 1988) 10

Nat'l Wildlife Fed'n v Gorsuch
693 F.2d 156 (D.C. Cir. 1982). 9, 10

Oil, Chemical 7 Atomic Workers Int'l v. RMI Taitanium Co.
199 F.3d 881, 894 (6th Cir. 2000) 23

PUD No. 1 of Jefferson County et al. Washington Department of Ecology et. al.
551 U.S. 700,720 (1994) 21

Robinson v. Shell Oil Co.
519 U.S. 337, 340 (1997) 15

Skidmore v. Swift & Co.
323 U.S. 134 (1944) 14, 15

South Florida Management District v. Miccosukee Tribe of Indians
541 U.S. 95 (2004) . . . . . *passim*

United States v. Heirs of Boisdore
49 U.S. 113 (1849) 12

United States v. Earth Sciences, Inc.
599 F.2d 368, 373 (10th Cir. 1979) 22

U.S. v. Mead Corp.
533 U.S. 218, 226 (2001). 14

STATUTES:

Clean Water Act

33 U.S.C. Section 1251 (a). 16, 23
33 U.S.C. Section 1311 (a). 3,.16
33 U.S.C. Section 1341 . . . . . 1, 3, 7
33 U.S.C. Section 1342 . . . . . 1, 3, 7
33 U.S.C. Section 1314 (f)(1)(2)(F). 3, 5, 22

33 U.S.C. Section 1362 . . . . . *passim*

CODE OF FEDERAL REGULATIONS:

40 CFR 122.23 12
40 CFR 122.26 (a)(1)(ii), (b)(14)(iii) 12
40 CFR 122.26 (a)(9)(i). 12
40 CFR 122.34 (b)(i).. 12

INTERESTS OF *AMICUS CURIAE*

Amicus Curiae Friends of the Everglades ("Friends") respectfully submits this brief supporting the findings below upholding the State of Maine's determination to issue water quality certification conditions on the relicensing of the hydropower dams owned and operated by S.D. Warren on the grounds that releases of water from the dams into the Presumpscot River constitute "any discharge," whether or not the releases meet the definition of "discharge of pollutants".

Amicus Curiae Friends of the Everglades is a non-profit association whose members' interests are in the protection and enhancement of the Natural Everglades ecosystem, a vast marshland which covers much of South Florida. It begins in the Kissimmee River watershed and flows through Lake Okeechobee and the Everglades, including the Loxahatchee National Wildlife Refuge and the Everglades National Park, and ends at Florida Bay.

Amicus Curiae has a significant stake in this Court's determination of the issues raised by the Petitioner in its Brief submitted to this Court. Petitioner argues that the test to determine whether the Federal Clean Water Act ("CWA") requires a Certification under section 401 of the Act, 33 U.S.C. § 1341, is the same test as is required under the Act to determine whether a permit is required to discharge pollutants under section 402 of the Clean Water Act, 33 U.S.C. § 1342. Petitioner then alleges that the findings below are contrary this Court's findings in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).

Amicus Curiae Friends of the Everglades were Co-respondents before this Court in *Miccosukee*. The case was remanded by this Court, and is currently in the District Court for the Southern District of Florida under the mandate of this

Court to make a factual determination as to whether there is no meaningful distinction between the natural Everglades area and the C-11 drainage basin from which polluted water is discharged by the S-9 pump station into the Everglades. A ruling by this Court in favor of Petitioner's argument could significantly effect the interests of *Amicus* in the *Miccosukee* case.

Both the Petitioner and the Respondent have consented to the filing of this *Amicus Curiae* Brief.

SUMMARY OF ARGUMENT

The principle issue raised by the Petitioner in the case before this Court is if the State of Maine can impose conditions on recertification of discharges from several dams owned and operated by S.D. Warren Company on the Presumpscot River under section 401 of the Federal Clean Water Act ("CWA"), 33 U.S.C. § 1341. In support of its position that the Maine decision was inappropriate, the Petitioner relies on this Court's recent decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); as well as Environmental Protection Agency's ("EPA") recent Interpretation of the Clean Water Act of August 5, 2005, both of which deal with the authority to issue permits under section 402 of the Act, 33 U.S.C. § 1342. These are National Pollutant Discharge Elimination System ("NPDES") permits. Petitioner also asserts the relevance of section 304(f)(2)(F) of the CWA, 33 U.S.C. § 1314(f)(2)(F), as support for the argument that dams, such as the petitioner owns, are nonpoint sources of pollutants rather than point sources, which are exempted under section 402 NPDES permit requirements.

Petitioner asserts that the section 402 arguments are relevant in an inquiry of the appropriateness of a section 401Certification requirement because the requirement to determine if there is "any discharge" under section 401(a) is the same as the requirement to determine if there is a "discharge of pollutants" under section 301(a) of the Act, 33 U.S.C. § 1311(a), that would then require an NPDES permit under section 402.

The *Amicus Curiae* Friends of the Everglades will not address the issue of whether section 401 Certification and section 402 Permitting should be required to meet the same test of whether there is a discharge of pollutants. Instead, the Friends of the Everglades will address the issues of whether this Court's determination in *Miccosukee* is correctly stated by the Petitioner and is relevant to this case; whether the Petitioner's reliance on section 304(f)(2)(F) is appropriate; and whether the EPA Interpretation cited by Petitioner is

supportable.

The Petitioner cites the decision of this Court in *Miccosukee* as holding that the question of whether a NPDES permit is required turns on whether the waters being discharged to are meaningfully distinct from the waters discharged from. (Pet. Br. at 21). It is the belief of *Amicus Curiae* that this Court in *Miccosukee* made no such finding. The case was remanded below with this Court's mandate to resolve a factual dispute raised by the South Florida Water Management District ("WMD"). This Court specifically reserved making any decision in *Miccosukee* on the meaning of "discharge of pollutants" determined by the District Court or the Eleventh Circuit Decision until the Courts below complied with the mandate to reopen the record to resolve the factual dispute.

The often repeated test which Congress imposed by definition to determine what "discharge of a pollutant" means is, "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). There is no exemption under this test for a discharge within the same water body.

The first part of this test Congress imposed is to determine whether a pollutant is being **added to** a navigable water. So the inquiry must begin with evaluating the receiving body of water to determine if a pollutant is being added. Congress limits the inquiry as to where the pollutants came from to whether the pollutants are discharged "from a point source," not from where the pollutants originated. This court made this clear in *Miccosukee* when it determined that the NPDES program is not limited to when a point source is the originator of the pollutants being discharged, but also includes when pollutants originating elsewhere merely pass through the point source. The point source "need only convey the pollutant to 'navigable waters' which are, in turn, defined as 'the waters of the United States.'" *Miccosukee*, 541 U.S. at 105.

At the conclusion of *Miccosukee*, this Court speculated that "it is possible that the District Court will conclude that C-11 and WCA-3 are not meaningfully distinct water bodies. If it does so, then the S-9 pump station will not need an NPDES permit." Id. at 112. This statement is not a new legal standard

enunciated by this Court as to when an "addition of a pollutant" does or does not occur that would result in the need for an NPDES permit. The only support for the statement that the S-9 would not need an NPDES permit if the WCA-3 is not meaningfully distinct from the C-11 drainage basin is the Court's previous statement in *Miccosukee* that, "The Tribe (meaning both the Tribe and Friends of the Everglades), does not dispute that if C-11 and WCA-3 are simply two parts of the same water body, pumping from one into the other cannot constitute an "addition of pollutants." Id. at 109.

When *Miccosukee* was released the Tribe filed a Petition For Rehearing for the limited purpose of correcting the above cited statements. The briefs of both Respondents Tribe and Friends were cited, as well as excerpts of the transcript of the Oral Argument, to support the fact that both parties had argued that a discharge from one part of a water body to another part of that same water body could require a NPDES permit. (Friends App. at pp. 1-8).

Petitioner S.D. Warren's reliance on section 304(f)(2)(F), 33 U.S.C. § 1314(f)(2)(F), as support for the argument that a dam discharge is a nonpoint source discharge, and therefore not subject to the requirement for a NPDES permit is based on a basic misunderstanding of the section.

Through section 304(f) of the CWA, Congress required EPA to consult with federal and state agencies in order to develop and issue information including for two numerically designated purposes. The first, section 304(f)(1), 33 U.S.C. § 1314(f)(1), is to establish guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants. The second, section 304(f)(2), 33 U.S.C. § 1314(f)(2), is to develop information on processes, procedures, and methods to control pollution resulting from six different sources, listed as (A) through (F).

Section 304(f)(2)(F), which is what Petitioner relies on, is "changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." These activities are not nonpoint

sources, as identified in section 304(f)(1), but are other sources of pollution. EPA currently regulates three of those other sources, sections 304(f)(2)(A), (B) and (C) under section 402 NPDES permits.

The terms of section 304 (f)(2)(F) and the definition of "point source" are quite similar. The basic difference between these two provisions of the CWA is the phrase in the definition of "point source" that states, "from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The only way to determine if an activity that could be either a "change in movement, flow, or circulation of any navigable water..." under section 304(f)(2)(F), or a point source discharge as defined in section 502(14), 33 U.S.C. § 1362(14), is to **determine if there is or might be a discharge of pollutants** as a result of that discharge activity into our nation's waters.

The EPA Interpretation cited by and relied on by the Petitioner, at page 22 of its Brief, was introduced by EPA on August 5, 2005, as an Exhibit in support of its Motion For Summary Judgment as to Intervenor Defendant in the case of *Friends of the Everglades v. South Florida Water Management District*, Case No.02-80309, Southern District of Florida. (EPA Interpretation Memorandum).

Because there are material facts in dispute, the Judge in the *Friends of the Everglades* case has denied all parties' motions for summary judgment, and has ordered trial to commence on January 9, 2006.

ARGUMENT

A. The Supreme Court Opinion In *South Florida Water Management District v. Miccosukee Tribe of Indians* Did Not Hold That There Is No Addition Of Pollution From One Water Body To Another If There Is No Meaningful Distinction Between The Two Water Bodies.

The Petitioner S.D. Warren Company, at page 21 of its memorandum submitted to the Court, attempts to argue that this Court's Opinion in *Miccosukee*, holds that the definitional requirement that there must be an "addition of pollutants" turns on whether the water being discharged from is or is not "meaningfully distinct" from the water being discharged into. 541 U.S. 95 (2004).[1]

It is the belief of *Amicus Curiae* that this Court in *Miccosukee* made no such finding. The case was remanded with this Court's mandate to resolve a factual dispute raised by the South Florida Water Management District. The District alleged that there is no meaningful distinction between the water being discharged into, the Everglades area known as Water Conservation Area 3-A (WCA-3), and the water being discharged from by the S-9 pump station, the drainage canal known as the C-11 Canal, and they are thus essentially one water body.

This Court determined that the factual dispute in *Miccosukee* made the District Court's summary judgment

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[1] This Court in *Miccosukee* did not address the meaning of "any discharge" in section 401 of the Clean Water Act, 33 U.S.C. §1341, to determine if a certification is required. In *Miccosukee* the question was whether a National Pollution Discharge Elimination System (NPDES) permit under section 402 of the Clean Water Act ("CWA"), 33 U.S.C.§ 1342, is required. A permit under section 402 requires the determination that there is a "discharge of any pollutant by any person," as required by section 301(a), 33 U.S.C. §1362(12). These are two different tests, as are the purposes between sections 401 and 402 of the CWA.

premature. This Court specifically reserved making any decision in *Miccosukee* on the legal issue of the meaning of the term "any addition of any pollutant" until the courts below complied with the mandate to reopen the record to resolve the factual dispute. 541 U.S. at 103.

At the conclusion of *Miccosukee* this Court speculated that "it is possible that the District Court will conclude that C-11 and WCA-3 are not meaningfully distinct. If it does so, then the S-9 pump station will not need an NPDES permit." Id. at 112. This statement is not a new legal standard enunciated by this Court as to when an "addition of a pollutant" occurs that would require an NPDES permit.

The only support for the statement that the S-9 would not need an NPDES permit if the WCA-3 is not meaningfully distinct from the C-11 drainage basin is the Court's previous statement in *Miccosukee* that, "The Tribe (meaning both the Tribe and Friends of the Everglades), does not dispute that if C-11 and WCA-3 are simply two parts of the same water body, pumping from one into the other cannot constitute an "addition of pollutants." *Id.* at 109.

When the *Miccosukee* Opinion was released the Tribe filed a Petition For Rehearing, with the consent of the Friends of the Everglades, for the limited purpose of correcting the above cited statements. The briefs of both Respondents Tribe and Friends were cited, as well as excerpts of the transcript of the Oral Argument, to support the fact that both parties had argued that a discharge from one part of a water body to another part of that same water body could require an NPDES permit.[2] (Friends App. at pp. 1-8).

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[2] Several examples illustrate the problem with suggesting that a discharge within the same water body could not constitute an addition of pollutants. In a lake there are deep parts usually in the center where sediments settle, and there are often shallow areas around the edge of the lake, that have different plant and aquatic life. If the sediments from the middle of the lake were pumped through a pipe to the shallow areas of the lake where grasses grow those shallows areas would be severely harmed by the sediment, which is a pollutant. Also, in many streams and rivers there can be different areas that have different characteristics of chemistry,

It is clear from the arguments raised by the Petitioner in this case that the misconceptions of the Court Opinion raised in the Petition for Rehearing in the *Miccosukee* case are causing confusion in the courts below.

The purpose of the South Florida Water Management District's use of the term "not meaningfully distinct" was to argue that there could be no "addition of any pollutant" from one body of water, the Everglades, to the other, the C-11 drainage basin, if they were significantly similar enough to be considered one water body.

The often repeated test, which Congress imposed by definition, to determine what "discharge of a pollutant" means is, "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). There is no exemption under this test for a discharge within the same water body.

The first part of this test Congress imposed is to determine whether a pollutant is being **added to** a navigable water. So the inquiry must begin with evaluating the receiving body of water to determine if a pollutant is being added. Congress limits the inquiry as to where the pollutants came from to whether the pollutants are discharged "from a point source," **not from where the pollutants originated**. This Court made this clear in *Miccosukee* when it was determined that the NPDES program is not limited to when a point source is the originator of the pollutants being discharged, but also includes when pollutants originating elsewhere merely pass through the point source. The point source "need only convey the pollutant to 'navigable waters,' which are, in turn, defined as 'the waters of the United States.'" *Miccosukee*, 541 U.S. at 105.

The "not meaningfully distinct water body" argument as raised by the South Florida Water Management District in *Miccosukee* was an attempt to tie in the facts of the case with the often cited "dam" cases, *Nat'l Wildlife Fed'n v. Gorsuch,*

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temperature, depth, plant and other aquatic life, to the point where the discharge of water from one part to the other could cause harm.

693 F.2d 156 (D.C. Cir. 1982); and *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), which held, based on EPA Opinions, that a dam, which is a point source, does not add any pollutants to a water body if the pollutants are already in that same water body. The District argued that the C-11 Canal and the Everglades area known as WCA-3 are hydrologically indistinguishable parts of a single water body. (Pet. Br. at 48).

In the "dam" cases, *Gorsuch* and *Consumers Power*, EPA took the position that under section 304(f)(2)(F) of the Act, 33 U.S.C. § 1314(f)(2)(F), discharges from dams are exempt from NPDES permits as nonpoint sources under the language of section 304(f)(2)(F) of the Act, 33 U.S.C. § 1314(f)(2)(F) . *Gorsuch*, 693 F.2d at 169. Further, the EPA took the very narrow view that the definition of pollutants under the Act was limited to the specific terms within the definition at section 502(6), 33 U.S.C. § 1362(6), and did not include such things as low dissolved oxygen, changes in temperature and supersaturation, arguing that these changes were water "conditions" not substances. Id. at 171. And finally, EPA took the position that an addition of a pollutant from a point source occurs only if the point source itself introduces a pollutant into water **from the outside world**. *Id.* at 175. In both of these cases the Circuit Courts relied heavily on the EPA Opinions, based on the concept of deference, and found that the dam discharges in question did not need to have an NPDES permit.

B. Section 304(f)(2)(F) Is Not An Exemption For Nonpoint Sources.

Through section 304(f) of the CWA, Congress required EPA to consult with federal and state agencies in order to develop and issue information including for two numerically designated purposes. The first, section 304(f)(1), is to establish guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants. The second, section 304(f)(2), is to develop information on processes, procedures

and methods to control pollution resulting from six different sources, listed as (A) through (F). Section 304(f)(1) of the CWA deals with nonpoint sources, not section 304(f)(2).

The EPA and the Courts in the "Dam" cases assume that discharges from dams within the same water body should be treated as a nonpoint sources based on the terms of section 304(f)(2)(F). There are two serious misinterpretations of section 304(f)(2)(F) in attempting to use this to provide a new exemption under the Act for nonpoint sources.

First, they read section 304(f)(2)(F) as dealing with nonpoint sources of pollution. Section 304(f) requires EPA to identify and evaluate and develop guidelines for two concerns:

> "(1). . . the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures and methods to control pollution resulting from, (subsections (A) through (F))." The listed activities in subsections (A) through (F) of 304(f)(2) are not listed under nonpoint sources of pollutants in section 304(f)(1), but as a separate category of sources of pollution under section 304(f)(2)." *Id.*

The clear purpose of Congress is to separate the nonpoint sources of pollutants under section 304(f)(1) from other sources of pollutants such as agricultural, mining, construction, salt water intrusion, and changes in movement, flow or circulation of navigable waters, under section 304(f)(2), by numbering them separately.

Looking at section 304(f)(2) as a whole this is the only way it makes sense. If section 304(f)(2) were interpreted as being included within the section 304(f)(1) nonpoint source category, then all the activities defined in sections 304(f)(2)(A) through (E), as well as (F), would also be nonpoint sources of pollutants, in addition to section 304(f)(2)(F). This the EPA cannot accept. EPA regulations expressly require an NPDES permit for point source discharges for many of the activities listed in section 304(f)(2), including, under section

304(f)(2)(A), agricultural activities involving concentrated animal feeding operations, regulated at 40 CFR 122.23; mining activities, section 304(f)(2)(B), regulated at 40 CFR 122.26(a)(1)(ii), (b)(14)(iii); and construction activities, under section 304(f)(2)(c), regulated at 40 CFR 122.26(a)(9)(i), (b)(14)(x), (b)(15)(i), 122.34(b)(i).

A statute's plain meaning must be enforced. The Supreme Court has stressed, "over and over," that in construing the language of a statute the court must not be guided by a single sentence, but must be guided by the provisions of the whole law. *United States v. Heirs of Boisdore*, 49 U.S. 113 (1849). The only way to read section 304(f)(2) is to separate it from the nonpoint source section in 304(f)(1).

Another fundamental flaw with the EPA interpretation of section 304(f) is the assumption that section 304(f)(2)(F) is about the changes in movement, flow, or circulation **from one navigable water to another**. It is not. There is no mention of a transfer, connection or discharge of the movement of water from one water body to another under section 304(f)(2)(F). The only way to read this section, in light of the statute as a whole, is to recognize that it is deals with pollution from changes in movement, flow or circulation **within** the navigable waters that the changes are taking place in. When the pollution from these changes is then discharged through a point source into navigable waters it meets the definition of a "discharge of pollutants" at CWA section 502(12), 33 U.SC. § 1362(12).

C. The Inquiry Must Be Whether There Is A Discharge Of Pollutants.

Even assuming that section 304(f)(2)(F) could be read to establish Congress' intent to treat "changes in the movement, flow, or circulation of any navigable waters..." as nonpoint sources, and as including the movement from one navigable water to another, it still does not establish Congress' intent to separate those movements from consideration as point source discharges.

The EPA argues that discharges from changes in

movement in flow should be treated as nonpoint sources based on the terms of section 304(f)(2)(F), rather than a point source under section 402(a), as defined at section 502(14) of the CWA. Looking at the relevant language of these two provisions of the CWA it is striking how similar they are to one another. Under section 304(f)(2)(F), the language reads, "changes in movement, flow and circulation of navigable waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." The definition of a point source under CWA 502(14), 33 U.S.C. § 1362(14) is a "discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft..." This definition would clearly include the channels, causeways or flow diversion facilities under section 304(f)(2) (F).

The basic difference between these two provisions of the CWA is the phrase in the definition of "point source" that states: "from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The only way to determine if an activity that could be either a "change in movement, flow or circulation of any navigable water..." under section 304(f)(2)(F), or a point source discharge as defined in section 502(14), is to **determine if there is or might be a discharge of pollutants** as a result of that discharge activity into our nation's waters.

The Supreme Court, in *Miccosukee,* supports this conclusion by stating, "That (point source) definition makes plain that a **point source** need not be the original source of pollutant; it **need only convey the pollutant to "navigable waters,"** which are, in turn, defined as "the waters of the United States". 541 U.S. at 105. Determining if the point source conveys pollutants is thus the critical inquiry.

If the movement, flow or circulation of any navigable water contains pollutants, and is discharged from a point source that causes the addition of pollutants to the navigable water being discharged into, it requires a NPDES permit.

D. The August 5, 2005 EPA Interpretation Merits No Deference

The United States EPA Interpretation of August 5, 2005 cited by the Petitioner in this case beginning at page 22 of the Brief, was submitted to the Federal District Court for the Southern District of Florida on that same date, August 5, 2005. It was submitted in support of the United States' Motion For Summary Judgment, as an Intervenor Defendant in the case of of *Friends of the Everglades v. South Florida Water Management District*, Case No.02-80309. The Friends of the Everglades made the following argument to the Southern District Court on the EPA Interpretation:

> The EPA Interpretation that was submitted to the Court is not entitled to deference under *Chevron v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984). The interpretation has not been the subject of rule making, with the "fruits" of notice and comment; nor has it gone through any adjudication process before the agency. *U.S. v. Mead Corp.* 533 U.S. 218, 226 (2001). Under these circumstances deference as a matter of law under *Chevron* is not warranted.
>
> Even though EPA is not entitled to deference as a matter of law, under the direction of the Supreme Court in *Skidmore v. Swift & Co.* 323 U.S. 134 (1944), the court must look to see if some level of persuasiveness should be accorded to it. *Id.* at 139.

The interpretation offered by EPA in this case runs contrary to Congress' purpose and intent in passing the Federal Clean Water Act (CWA), as well as the specific provisions of the CWA; and is contrary to the determinations of the United States Supreme Court, as set forth more fully below, and cannot be given any deference.

In *Skidmore* the weight given to an agency interpretation should depend on the thoroughness evident in the consideration, the validity of the reasoning, and consistency with earlier pronouncements. Id. at 140. Even assuming it was not contrary to the CWA's clear purpose and provisions, the reasoning in the EPA Interpretation is not valid. It is not based on a thorough evaluation of the Act, but on selective portions of the CWA taken out of context with the purpose of the Act in order to allege that there are ambiguities within the provisions of the CWA when in fact there are not. The EPA Interpretation is divisive and not supported by the unambiguous terms of the Act. As a result, this Court cannot give any deference or weight to the EPA Interpretation.

Specifically, the EPA Interpretation states that water transfers, that is, any activity that conveys or connects navigable waters without subjecting the water to intervening industrial, municipal or commercial use, is exempt from NPDES requirements, (EPA Interpretation Memorandum), except for water transfer activities that had previously been determined to require NPDES requirements, (as set forth in Section VI of the Interpretation).

Under the doctrine of deference adopted by the Supreme Court in *Chevron* the first question to ask in determining whether to give credence to an agency statutory interpretation is whether the intent of Congress is clear within the terms of the statute; if the statute is silent or ambiguous with respect to a specific issue, then one must ask whether the agency's interpretation is based on a permissible construction of the statute. 467 U.S. at 842-43.

The starting point for statutory interpretation is the language of the statute itself. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The first step "is to determine whether the language at issue has a clear and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The inquiry ceases "if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *Id.* That is the case here.

The language of the CWA clearly demonstrates that Congress intended that any discharge of any pollutant from any point source into our nation's waters is to be regulated under the NPDES program set forth in the CWA.

There is no ambiguity within the language of the Clean Water Act which could enable the EPA to restrict the scope of the NPDES permit program to exclude from regulation every conveyance not subject to intervening industrial, municipal or commercial uses, (except those the EPA has already included).

The CWA is a comprehensive act of Congress, passed in 1972, amended in 1977 and again in 1987, with Congress' specific objective to restore and maintain the chemical, physical and biological integrity of the Nation's waters. CWA §101(a), 33 USC §1251(a).

The core of the CWA is the Congressional prohibition that, "Except in compliance with this (Act), the discharge of any pollutant by any person shall be unlawful," CWA §301(a), 33 USC §1311(a). There is no ambiguity in the inclusive language of this section. Any discharge of any pollutant is covered by the prohibition.

To make it even more clear Congress defined the term, "discharge of a pollutant" as, "any addition of any pollutant to navigable waters from any point source." CWA §502(12), 33 USC § 1362(12). There are no exclusions or other limitations provided by Congress in defining what was meant to be included in the general prohibition under section 301(a).

Exemptions from the requirements of the CWA can only be established through the legislative process, not by agency interpretation, nor by agency regulation. The CWA requires that any discharge of pollutants through a point source into our nation's waters be regulated by the NPDES provisions of the CWA, section 402(a), unless the activity does not come within the parameters of the definitions Congress has established to implement its purposes and goals.

Congress has provided specific exemptions from NPDES requirements in the CWA. Section 502(14), 33 USC § 1362(14), the definition of "point source," exempts "agricultural stormwater discharges and return flows from

irrigated agriculture" from the definition. If Congress wanted to exempt from point sources all conveyances from one navigable water to another it would have done so. A fundamental principle of statutory construction, *expressio unius est exclusio alterius,* holds that express inclusion of one item implies the intent to exclude other items not included. *Edward Christensen, et. at., v. Harris County, et. al,* 529 U.S. 576, 582-83 (2000).

Congress has also provided two specific exemptions under the definition of the term pollutant: sewage from vessels or a discharge incidental to the normal operation of a vessel of the armed forces; and water, gas, or other material which is injected into a well to facilitate production of oil, gas or water derived in association with oil or gas production, and disposed of in a well, if the well is approved by the state. CWA §502(6), 33 U.S.C. § 1362(6). Congress could have extended the exceptions to include pollutants from one navigable water body to another. It did not. *Expressio unius est exclusio alterius.*

EPA is attempting to add a major new exemption through its Interpretation, where Congress has limited exemptions to the Act by legislative amendment. Congress did not provide EPA with any specific authority under the CWA to exempt any category of dischargers by regulation, much less to limit the extent of the CWA by interpretation.

The whole concept of the CWA is to restore and maintain the chemical, physical and biological integrity of our nation's waters. One of the Congressional goals of the CWA is to eliminate the discharge of pollutants into navigable waters. The purpose of the CWA, to restore the integrity of our nations waters, cannot be given any credence if EPA can categorically exempt all conveyances from one water to another unless subjected to industrial, municipal or commercial use. The CWA would become an Act to regulate industrial and municipal treatment systems, not an act to clean and restore our nation's waters, if NPDES permits were limited to the EPA Interpretation.

Congress' intent in enacting the 1972 Clean Water Act Amendments was clearly to establish an all-encompassing

program of water pollution regulations. Rep. No. 92-414, at 95, 2 Leg. Hist.1511. As the Supreme Court stated, the 1972 Amendments established "a comprehensive program for controlling and abating water pollution." *Milwaukee v. Illinois*, 451 U.S. 304 (1981).

In *Milwaukee*, the Supreme Court concluded that, "**Every** point source discharge is meant to be prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." *Id.* at 318. (Emphasis added.)

In the case of *EPA v. California ex rel. State Water Resources Control Board ("EPA v. California")*, 426 U.S. 200 (1976), the Supreme Court dealt with the history of what prompted the 1972 Amendments, beginning with the fact that the federal water pollution program up to that time was "inadequate in every vital aspect." Citing S. Rep. 92-414, Id. at 202-03.

The Supreme Court recognized that the 1972 Amendment introduced two major changes in the methods of setting and enforcing standards to abate and control water pollution. "First, the Amendments are aimed at achieving maximum 'effluent limitations' on 'point sources,' as well as achieving acceptable water quality standards." *EPA v. California*, 426 U.S. at 205. "Second, the amendments established the National Pollutant Discharge Elimination System (NPDES) as a means of achieving and enforcing the effluent limitations." *Id.* at 205.

The purpose of the major changes was to deal with the problem of enforcement inherent in the prior cumbersome enforcement procedures. The prior procedures employed ambient water quality standards which specified acceptable levels of pollution in the navigable waters, rather than applying the specified acceptable levels at the source of the discharge into the water. As the Supreme Court stated in *EPA v. California*, "Such direct restrictions on discharges facilitate enforcement by making it necessary to work backward from an over-polluted body of water to determine which point sources are responsible and which must be abated." *Id.* at 204.

Under the CWA definition of the term "discharge of a pollutant," the focus of determining whether the CWA restriction under section 301 applies is to look "**to**" the receiving body of water, and determine if there are "**any**" pollutants being added to the receiving water from "**any**" point source. The meaning of the terms "any" and "to" are unambiguous. "Any" means "every or all, in relation to which pollutants and which point sources." Webster's New Century Dictionary (2001). "To" means simply "motion or direction toward a point, person, place or thing," not "from." *Id.*

In order for the EPA/DOJ tp create this broad new exemption of water transfers from the NPDES program the EPA has to draw assumptions and inferences from peripheral sections of the CWA, employing subjective "interpretations" of what these sections mean collectively, not within the language of these sections themselves. That is why the DOJ repeatedly uses the phrase relating to the CWA, "**when read as a whole,**" relying on sections 101(g), 510(2), and 304(f)(2)(F), to create their argument. (EPA Interpretation Memorandum).

The EPA Interpretation, relied on by the DOJ, defines a water transfer as, "any activity that conveys or connects navigable waters without subjecting the water to intervening industrial, municipal or commercial uses." (EPA Interpretation Memorandum). Not only is this definition contrary to the Supreme Court Determination in *Miccosukee,* that "the definition of a **point source** need not be the original source of the pollutant; it **need only convey the pollutant to 'navigable waters,'** which are, in turn, defined as 'the waters of the United States.'" 541 U.S. at 105(Emphasis added); It also creates a definition completely outside the scope of and without the support of the CWA.

Nowhere in the sections relied on by EPA and DOJ, or anywhere in the CWA, is the term "water transfer" used, identified or defined. Nowhere in the CWA is the phrase "conveys or connects navigable waters" identified or defined. Neither are the terms "convey" or "connect" independently used in any of the sections of the CWA relied on by the Intevenor Defendant. Without the use of the term "connect" the

definition would not work.

Nor does the CWA mention or define what the term "subjecting the water to intervening..." uses means. The EPA Interpretation gives no guidance. The CWA does define the term "industrial user" at section 502(18), 33 U.S.C. § 1362(18), and the term "municipality" in 502(4), 33 U.S.C. § 1362(4), which gives some insight into what industrial and municipal uses might mean but these terms are not used in the provisions of the CWA relied on by the DOJ to limit the scope of the Congressional intent to prohibit discharges of pollutants to be related only to industrial, municipal or commercial uses.

There is thus no authority in the CWA to support the use of the term "water transfer" and its created definition to define or limit any activity which discharges pollutants into navigable waters from being regulated under the NPDES program.

E. Nonpoint Sources Are Not Exempt From Point Source Provisions Of The CWA.

The next problem with the DOJ argument that water transfers are exempt from NPDES permitting is that the principle provisions of the CWA must be ignored to reach that desired conclusion. To accomplish the task of avoiding review under the point source provisions of the CWA, the DOJ states, "Looking to the statute as a whole reveals that a fact-specific inquiry into every water transfer is legally irrelevant." (EPA Interpretation Memorandum).

The DOJ argument, although not clearly articulated, is that as a matter of law, if there is water transfer activity it is de facto a nonpoint source under section 304(f)(2)(F). If it is a nonpoint source it cannot be a point source according to the DOJ. Therefore, the analysis as to whether or not that activity is subject to the point source provisions of an NPDES permit should not be made. The United States Supreme Court disagrees. In *Miccosukee,* the Supreme Court stated that, "We note, however, that section 1314(f)(2)(F) does not explicitly exempt nonpoint pollution sources from the NPDES permit

program if they also fall within the 'point source' definition." 541 U.S. at 106.

The DOJ argument of exemption of all non-industrial, municipal, commercial use point source discharges as nonpoint source is based on a misguided attempt to restore states' control over water quality responsibilities that Congress removed from them in the 1972 CWA. See 451 U.S. at 310; 426 U.S. at 202-03.

This is clearly contrary to the intent of the CWA to restore and maintain the chemical, physical and biological integrity of our nation's waters; and to establish as a national goal the elimination of the discharge of pollutants into our nation's waters. CWA sections 101(a) and 101(a)(1). It is also contrary to the United States Supreme Court view of the scope of the CWA, which is that "every point source discharge is meant to be prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." *Milwaukee* 451 U.S. at 318; *EPA v. California ex rel. State Water resources Board,* 426 U.S. at 200; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.* 452 U.S. 264, 282 (1981)(finding that the CWA is a paradigm of environmental regulation, and is an "accepted exercise of federal power").

The provisions of the CWA that are relied upon by the DOJ, as well as the South Florida Water Management District, in attempting to redefine the CWA, are peripheral to and not supportive of the primary goal of the CWA to restore our nation's waters.

The goal of the CWA to maintain the water allocation rights of states contained in section 101(g) of the CWA merely reaffirms those existing rights and does not conflict with federal regulation of water quality point source discharges. Both the Supreme Court and Congress have made this clear. Sections 101(g) and 510(2) preserve the authority of each state to allocate water quantity between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained permits pursuant to a state permit, a water allocation permit. *PUD No. 1 of Jefferson County et. al. v.*

Washington Department of Ecology et. al., 511 U.S. 700, 720 (1994). In the Legislative History of the CWA, 1977 Amendments, when section 101(g) was added, it was stated, "The requirements [of the CWA] may incidentally affect individual water rights . . . It is not the purpose of this Amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that state allocation systems are not subverted, and that effects in individual rights, if any, are prompted by legitimate and necessary water quality considerations." Ser. No. 95-14, p. 532, at 721 (1978).

The remaining provision relied upon by DOJ, section 304(f), sets out the requirements to provide guidelines to the states for identifying and evaluating the nature and extent of two sources of activities. The first, in section 304(f)(1), is nonpoint sources of pollutants. The second is for processes, procedures and methods to control pollution resulting from agricultural, mining, construction activities and salt intrusion, as well as changes in movement of waters. CWA § 304(f)(2), 33 U.S.C. § 1314(f)(2). These guidelines are also supplemental to the primary purpose of the CWA to restore the water quality of our nation's waters through control of point sources of pollutants.

As the Tenth Circuit Court of Appeals determined, nowhere in section 304(f) does it exempt the permit requirement for point source discharges. The Tenth Circuit held that the provision does not create nonpoint exemptions from the CWA's NPDES requirement, stating "mining and other categories listed in section 1314(f)(2) may involve discharges from both point and nonpoint sources, and those from point sources are subject to regulation." *United States v. Earth Sciences, Inc.* 599 F.2d 368, 373 (10th Cir. 1979). This decision was the result of an EPA enforcement action.

The **DOJ's** repeated assertions that their concept of an exemption for water transfers from NPDES permitting is the **holistic view of the CWA**, "which gives due consideration to all of the relevant provisions and goals," and is a view of the "CWA read as a whole," **is a sham**. (EPA Interpretation Memorandum).

F. There Is No Distinction Between Pollution And Pollutants.

The DOJ alludes, and the WMD directly argues, that the CWA draws a clear distinction between the term "pollution" and the term "pollutant," implying that pollution is a term dealing with nonpoint sources under the CWA, and pollutant with point sources under the CWA. (EPA Interpretation Memorandum). This distinction simply makes no sense.

The CWA does not distinguish between the terms "pollution" and "pollutant." The CWA does not segregate problems with pollution from nonpoint sources and problems with pollutants from point sources. The very section of the CWA relied upon by the Defendants to establish the assumption that Congress establishes a separate category of nonpoint sources of pollution, section 304(f)(2)(F), does not even refer to nonpoint sources. But section 304(f)(1) does, and it refers to developing guidelines for identifying nonpoint sources of **pollutants**, not pollution.

The definitions of pollutants and pollution are quite related. The term pollution means the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water. CWA § 502(19), 33 U.S.C. § 1362(19). These are the same terms as are stated in the primary goal of the CWA at 101(a), 33 U.S.C. § 1251(a). These terms are also reflected within the definition of "pollutant" at CWA 502(6), which includes "chemical wastes," "biological materials," "radioactive materials," and lots of physical materials, including, dredged spoil, solid waste, rock, sand, cellar dirt, as well as industrial, municipal and agricultural waste.

There is no reason within the goals and provisions of the CWA to try to make these two terms separate and distinct. A general principle of statutory construction is that courts are "required ... to interpret one statutory term in a manner that will not conflict with other terms." *Oil, Chemical & Atomic Workers Int'l v. RMI Titanium Co.* 199 F.3d 881, 894 (6th Cir.

2000).

If "pollution" as defined in the CWA is considered only in relation to nonpoint sources, then any discharge of "man-made or man-induced alterations of the chemical, physical, biological and radiological integrity of water" would be exempted as a point source. It would be impossible to separate point sources of pollutants of chemical, physical, biological and radiological wastes from the discharge of man-made alteration of the same materials.

CONCLUSION

S.D. Warren's Brief misinterprets this Court's Opinion in the case of *South Florida Water Management District v. Miccosukee Tribe of Indians,* 541 U.S. 95 (2004).
The reliance of the Petitioner, as well as the EPA and the D.C. and Sixth Circuit Courts of Appeal in the "Dam" cases, and the EPA in its August 5, 2005 Interpretation on section 304(f)(2)(F) as a statutory exemption for nonpoint sources is contrary to the plain meaning and intent of that section. Further, Warren's reliance on the EPA August 5, 2005 Interpretation is inappropriate, as the Interpretation is contrary to the terms and conditions of the Federal Clean Water Act, and this Court's numerous interpretations of relevant portions of that Act.

For the foregoing reasons, *Amicus* respectfully urges the Court to affirm the lower court's decision regarding Maine's decision to require 401 Certification conditions to the discharges of the Petitioner S.D. Warren's dams on the Presumpscot River in Maine.

Respectfully submitted,

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No. 02-626

IN THE

Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA
And FRIENDS OF THE EVERGLADES, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR REHEARING

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STATEMENT

Pursuant to Sup. Ct. R. 44, the Tribe requests rehearing to correct statements in the Opinion which inaccurately state the Tribe's position in this appeal, and which, if left uncorrected, could cause confusion on remand.[1] The corrections are necessary not only to reflect the clear record before the Court regarding the Tribe's long standing positions — before the district court, before the circuit court and in its brief and argument to this Court — but also because they clarify the hydrological relation between these two distinct surface water bodies. Rehearing is proper because the portion of the Opinion that was remanded contains misconceptions of fact.

1. The Opinion Should Be Corrected To Reflect That The Tribe Does Argue That a Permit Would Be Required Even If the WCA-3 And The C-11 Are Determined To Be Two Parts Of The Same Water Body.

The Opinion states: "The Tribe does not dispute that if C-11 and WCA-3 are simply two parts of the same water body, pumping water from one into the other cannot constitute and an 'addition' of pollutants." *South Florida Water Management District ("SFWMD") v. Miccosukee Tribe of Indians, et al.*, 124 S. Ct. 1537, 1545 (2004). This is incorrect.

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1. The Tribe fully recognizes that rehearing petitions are granted only rarely and that they are not a vehicle for rearguing a case the Court has taken great care in deciding. *See* Sup. Ct. R. 44. Nevertheless, the Tribe understands that the Court will make changes "to correct certain inaccuracies or omissions brought to light by a petition for rehearing...." Robert L. Stern, *et al.*, Supreme Court Practice 729 (8th ed. 2002) (collecting cases). The Tribe respectfully submits that the Court should grant rehearing in this case for the limited purpose of the correcting two material inaccuracies in the Opinion regarding the Tribe's positions in this appeal.

At oral argument, the Tribe's counsel argued that permits would be required even if the WCA-3 and the C-11 were found to be the same body of water:

> QUESTION: ...do you think that if it — if— if it is established that — that this is the same water body, these pumps would be ok without permitting.
>
> MR. LEHTINEN: No, your honor, because...
>
> QUESTION: I thought so...

(Tr. at 37)

* * *

> QUESTION: But you say this doesn't matter anyway. You wouldn't care if it was the same water body. That isn't — that isn't what you are arguing.
>
> MR. LEHTINEN: We do argue that [if] it is the same water body and you pump it substantially upstream. You would also need a permit.
>
> QUESTION: Right, right.

(Tr. at 43.44).

Relying on *Dubois v. United States Department of Agriculture,* 102 F.3d 1273 (1st Cir. 1992), the Tribe's counsel explained that whether the WCA-3 and the C-11 are considered to be one body of water (i.e, hydrologically connected) or not is irrelevant because water from the C-11 naturally flows in an easterly direction — away from WCA-3.
(Tr. at 37-38). As the *Dubois* Court explained:

> The [] 'hydrological connectedness' proposal ignores a fundamental fact about water: the direction of flow.

> It is true that Loon Pond and the East Branch of the Pemigewasset River are "hyrdrologically connected" in the sense that water from the pond flows *down* and eventually empties into the River. But water from the East Branch certainly does not flow *uphill* into Loon Pond, carrying with it the pollutants that have undisputedly accumulated in the East Branch water from some of the other sources of water entering the East Breach from upstream. Under such circumstances, defendants cannot credibly argue that these water bodies are so related that the transfer of water *from* the East Branch *to* Loon Pond is not an "addition"" of water from one of the "waters of the United States" to another.

Dubois, 102 F.3d at 1298.

In its brief, the Tribe consistently argued that permits were required because "the S-9 pump station reverses the natural flow, backpumps 'against a gradient' or 'against what would flow naturally the other direction, or another direction,' the polluted water to the west, where it would not have flowed otherwise." (Resp. Br. at 8); (*see also* Resp. Br. at 12, 17 & 24); (*see also* Br. of Friends of the Everglades at 5 & 13). Accordingly, the Tribe did not, and has never, conceded that permits would not be required if it is determined that the C-11 and the WCA-3 are one, interconnected, body of water. The Court should correct the Opinion so that there is no confusion on remand.[2]

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2. The Court also states in *dicta* that:

> After reviewing the full record, it is possible that the District Court will conclude that C-11 and WCA-3 are not meaningfully distinct water bodies. If it does so, then the S-9 pump station will not need NPDES permit.

(Cont'd)

2. The Decision Should Be Corrected To Reflect That The Tribe Does Defend The Decisions Of The Lower Courts That The C-11 And The WCA-3 Are Distinct Because The Transfer Ff Water From The C-11 Into The WCA-3 Would Not Occur But For The S-9 Pump.

The Opinion also states that the district court applied a test for determining whether the C-11 and the WCA-3 are distinct water bodies which "neither party defends; it determined that C-11 and WCA-3 are distinct 'because the transfer of water or its contents from C-11 into the Everglades would not occur naturally.'" *SFWMD*, 124 S.Ct. at 1546. This statement is mistaken with respect to the Tribe's position.

The Tribe vigorously defends the district court's view that a permit is required because the transfer of surface water pollutants from the C-11 to the WCA-3 would not occur naturally. (Resp. Br. at 8, 12, 17 & 24); (*see also* Br. of Friends of the Everglades at 5 & 13). The Tribe did not otherwise explicitly defend the district court's application of this test

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(Cont'd)
SFWMD, 124 S. Ct. at 1547. To the extent this *dicta* was predicated on the Opinion's statement that the Tribe concedes that no permits would be required if the C-11 and WCA-3 are the same body of water, this language should be corrected because there was no such concession. Whether or not predicated on that assumption, the *dicta* should be corrected because it is confusing. Backpumping and discharging surface water containing pollutants from downstream sources into pristine areas upstream would require a permit even if the stream is the same hydrologically because it would involve the discharge of pollutants. Although the Court recognized this difference by using the term "meaningfully distinct" water bodies and "cause in fact," the *dicta* does not expressly set forth the criteria for establishing the "same body of water" test.

for distinguishing the two water bodies because the District simply did not challenge that test in its Petition to this Court. (*See* Pet. Br. at 46-49). Indeed, it would have been futile for the District to do so because the undisputed record evidence is that, absent the operation of the S-9 pumps, water from the C-11 would not naturally enter the Everglades Water Conservation Area:

> Water in the C-11 canal could occasionally, under extreme hydrologic conditions, flow from east to west. However, it would *not naturally* enter the Everglades Protection Area without operation of the S-9 pump station.

(J.A. at 193) (emphasis added). As the Eleventh Circuit explained, "[n]either party disputes that, without the operation of the S-9 pump station, the polluted waters from the C-11 Canal would not normally flow [west] into the WCA-3A." (Petition at 8a).[3]

CONCLUSION

For the foregoing reasons, this Court should grant rehearing.

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3. The Tribe clearly stated in its brief that the lower courts

> correctly found that the Petitioner's discharge of pollutants from the large pipes of the S-9 pump station was not a remote 'but for' cause of the pollutants reaching the Everglades Protection Area but instead it was the most immediate cause of the pollutants entering that area and as such constituted an 'addition'.

(Tribe's Br. At 24); (*see also* Br. of Friends of the Everglades at 9).

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CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44.1 of the Rules of the Supreme Court and is presented in good faith and not for delay.

DEXTER W. LEHTINEN